

breadth and burden of the must carry requirements on cable operators and programmers. In particular, to the extent a cable system is required to carry simultaneously the digital and analog broadcast signals of a local television station, especially those of a network affiliate, the must carry rules would violate section 614(b)(5) of the Act, which limits a cable operator's obligation to carry duplicative signals, and therefore be overly broad.⁵⁵ Congress specifically exempted cable operators from carrying duplicate signals because it recognized that "carriage of duplicate signals would do little to increase the diversity of local voices."⁵⁶ Congress further observed that this provision was necessary to "preserve the cable operator's discretion,"⁵⁷ and tailor "the specific requirements" of the must carry provisions to the particular interests of concern to Congress so that "they are not overly broad."⁵⁸ Thus any requirement that a cable operator must carry simultaneously the digital and analog signals of a local commercial television station would not only violate section 614(b)(5), but also the Constitution by imposing burdens on the First Amendment rights of cable operators that are not narrowly tailored to the specific objectives of the must carry regime.

Requiring cable operators to carry both digital and analog signals, or to carry digital broadcast transmissions that include multiple video streams, would also go way beyond what is necessary to preserve the existing structure of the Nation's broadcast

⁵⁵ 47 U.S.C. § 534(b)(5) ("a cable operator shall not be required to carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial station which is carried on its cable system, or to carry the signals of more than one local commercial television station affiliated with a particular broadcast network").

⁵⁶ S. Rep. No. 102-92 at 61; *see also* H.R. Rep. No. 102-628 at 94.

⁵⁷ H.R. Rep. No. 102-628 at 94.

⁵⁸ S. Rep. No. 102-92 at 61.

medium. When Congress enacted the must carry provisions in 1992, local television stations broadcast on a single channel in a market. Now, however, local stations will broadcast multiple video services during the transition to digital, including both an analog and digital service, and potentially multiple SDTV video services. Congress did not, however, intend to require cable operators to carry multiple video services broadcast by a station,⁵⁹ let alone a slew of services offered by a station. Rather, Congress assumed that the single video service then in existence would continue, and sought only to ensure that, when, or if, broadcasters began providing a significantly improved quality picture (*i.e.*, HDTV), cable operators would not degrade the quality of that service in retransmitting it to their subscribers.⁶⁰

The fact that Congress required cable operators to carry only the primary video signal of a broadcast station confirms that Congress did not intend the must carry rules to be used to transform, rather than maintain, the existing structure of the broadcast industry by requiring cable operators to carry multiple streams of programming provided by a single station.⁶¹ In the first place, the very use of the term “primary,” which connotes a

⁵⁹ See *e.g.* 47 U.S.C. § 534(b)(3) (limiting a cable operator’s must carry obligation only to the primary video transmission of each station).

⁶⁰ See *supra* text accompanying notes 9-10. Ameritech notes that congressional leaders in both the House and Senate have expressed outrage that broadcasters, after committing to continue their existing programming in a high definition format, are considering using their digital spectrum to provide multiple programming services. See Joel Brinkley, *Did Broadcasters Hoodwink Congress With False Promises About HDTV?*, THE NEW YORK TIMES ON THE WEB (Sept. 15, 1997) (“These congressmen, including chairmen of important committees in the Senate and House, are saying, in essence, that the broadcasters hoodwinked Congress by promising to broadcast HDTV when the award of their digital spectrum was in doubt, then reneged on that promise once the new channels were in hand.”). Indeed, Rep. Tauzin has stated that, “if there is no HDTV, then the question becomes, how much spectrum do you need to do a digital broadcast? We could take back the rest of it and auction it.” *Id.*

⁶¹ To the extent that a broadcast station uses the same call letters, facilities, and employees to broadcast programming in both digital and analog formats, and simulcasts any programming, it could not reasonably be said to be two different stations for must carry purposes. The Commission, therefore, could not reasonably find that the digital bitstream and analog signal of a broadcast licensee are two different stations for must carry purposes. See Notice at para. 72. If the Commission nevertheless concludes that the two

singular or individual thing, suggests that Congress did not intend to require cable operators to carry multiple streams of video programming broadcast by a station. More importantly, however, in considering whether to grant broadcasters spectrum flexibility, including the right to offer ancillary and supplementary services, Congress specifically contemplated that such services might include “multiple video services,”⁶² and expressly exempted such services from the must carry provisions.⁶³ As a consequence, any requirement that a cable operator must carry multiple video services broadcast by a station (whether an analog and digital signal, or multiple digital video streams) would go way beyond what is necessary to achieve the goals of the must carry regime, contrary to the second prong of the *Turner II* test.

In addition, advances in technology and the adoption of rules prohibiting restrictions on over-the-air reception devices, make A/B switches and other methods of over the air reception viable, less burdensome alternatives to ensure that viewers have access to over-the-air digital broadcast signals. While A/B switches and antennas may

signals are different stations, a cable operator could not be required to carry both video streams if they substantially duplicate each other, or if the station is a network affiliate. See 47 U.S.C. § 534 (b)(5). Moreover, it is clear that Congress’s chief objective in exempting cable operators from having to carry duplicative signals was to ensure that they would not have to carry duplicative program content. Consequently, the Commission must reject its absurd suggestion that the analog signal and digital bitstream of a particular broadcast television station are non-duplicative merely because they use different transmission formats even if they contain identical program content. *Id.*

⁶² See Notice at para. 72 n.152 (noting that the broadcast industry, in the legislative process, specifically cited the provision of “multiple video services” as a type of service that might be provided as an ancillary or supplementary service under section 336) (quoting Letter from Edward O. Fritts on behalf of NAB, INTV, ABC, CBS, NBC, and Fox to the Honorable Edward J. Markey, March 7, 1994).

⁶³ 47 U.S.C. § 336(b)(3) (“no ancillary or supplementary service shall have any rights to carriage under section 614 or 615 or be deemed a multichannel programming distributor for purposes of section 628”). The fact that Congress deemed it necessary to exclude “ancillary or supplementary” services from the term “multichannel programming distributor” (which is defined as a “person . . . who makes available for purchase . . . multiple channels of video programming,” 47 U.S.C. § 522(13)) confirms that Congress specifically contemplated that such services might include the provision of multiple streams of video programming, and consciously chose to deny broadcasters any must carry rights for such multiple streams.

not have been viable alternatives to mandatory signal carriage when the must carry provisions were enacted in 1992, that is certainly not the case today.⁶⁴ The reason is section 207 of the 1996 Act, and the Commission's implementing regulations, expressly prohibit both governmental and nongovernmental restrictions on the installation, maintenance and use of over-the-air reception devices covered by section 207 (which include devices to receive television broadcast signals), except in certain limited circumstances.⁶⁵ Consequently, most viewers will be able to receive digital broadcast signals over the air.⁶⁶ Additionally, viewers more readily accept outdoor antennae than they did in 1992, as demonstrated by the proliferation of outdoor dishes to receive satellite signals.⁶⁷

A/B switches are also much easier and more widely available to use now than in 1992. Indeed, such switches are routinely built into virtually all but very low end

⁶⁴ In 1992, Congress found that A/B switches and antennae up to that time had not been viable alternatives to mandatory signal carriage. Specifically, it found that A/B switches were "cumbersome, often ineffective, troublesome to install and operate, and are unacceptable to consumers." H.R. Rep. No. 102-628 at 54. It further found that, for many television households, the use of antennas was impractical or banned, leaving cable as the only way to receive a quality television signal. *Id.*, see also 1992 Cable Act, § 2(a)(18).

⁶⁵ Pub. L. No. 104-104, 110 Stat. 114 (Feb. 8, 1996); 47 C.F.R. § 1.4000; *In re Preemption of Local Zoning Regulation of Satellite Earth Stations; In Re Implementation of Section 207 of the Telecommunications Act of 1996, Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service*, IB Docket No. 95-59, CS Docket No. 96-83, 11 FCC Rcd 19276 (1996), Order on Reconsideration in CS Docket No. 96-83, FCC 98-214 (rel. Sept. 25, 1998).

⁶⁶ Even if some viewers, such as tenants in apartment buildings, may still be unable to install outdoor antennae to receive over-the-air broadcast signals, the imposition of digital signal carriage requirements on cable operators would do little, if anything, to ensure that they receive access to such signals because such viewers increasingly obtain multichannel video services from SMATV operators, which are not subject to must carry requirements, rather than cable operators.

⁶⁷ According to the Satellite Broadcasting and Communications Association (SBCA), there are currently over 9 million subscribers to DTH television, and the number of such subscribers is projected to reach 12 million by the year 2000. Comments of SBCA in CS Docket No. 98-102, at 6 (filed July 31, 1998). See also Comments of DIRECTV, Inc., in CS Docket No. 98-142 (filed July 31, 1998) (noting that, as of June 1998, it had 3.75 million subscribers nationwide).

television receivers and VCRs, and are easily and readily accessible through remote control devices. The fact that most subscribers to DTH satellite services must install a second antenna and use an A/B switch to access local television stations confirms that antennas and A/B switches are an inexpensive, easy to use, and therefore viable, alternative to digital must carry.⁶⁸ Given the cost of new digital receivers, it strains credulity to suggest that viewers that want access to digital broadcast programming would be unwilling to pay a minimal cost to install an antennae capable of receiving digital signals and to learn how to use a simple device like an A/B switch. Consequently, there is no longer any basis, if there ever was, for concluding that cable systems are a “gateway” or “bottleneck” through which digital broadcast signals must pass in order to reach viewers, including cable subscribers. Because anyone who wants to view such signals can easily and cheaply do so, there is no basis for concluding that mandatory carriage of digital broadcast signals is necessary to preserve over the air broadcast television, or even to facilitate the transition to digital broadcasting.

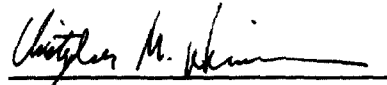
The imposition of digital must carry requirements, particularly during the transition period, would, therefore, impose significantly greater burdens on the First Amendment rights of both cable operators and programmers than are necessary to promote the objectives of the must carry regime. Accordingly, the imposition of such requirements would be unconstitutional under the Supreme Court’s decision in *Turner II*.

⁶⁸ See Comments of DIRECTV, in CS Docket No. 98-142 at 16 (noting that most of its subscribers receive their local channels at no cost with an off-air antenna, which can be seamlessly accessed via the A/B switch on a remote control unit). With such broad consumer acceptance of DTV, which requires a satellite dish, and an off-air antenna and A/B switch to receive local channels, claims that consumers will not use antennae and A/B switches to obtain digital broadcast signals are completely without foundation.

IV. Conclusion.

Imposing digital signal carriage requirements on cable operators, particularly during the transition period, would be inconsistent with the plain language of the must carry provisions. It would also impermissibly infringe upon the First Amendment rights of cable operators and programmers, and therefore violate the constitutional limits in this area established by the Supreme Court's decision in *Turner II*. Accordingly, the Commission should refrain from extending the must carry regime to digital broadcast signals, and instead permit market forces to work to facilitate the transition to digital broadcasting.

Respectfully submitted,



Christopher M. Heimann
Counsel for Ameritech New Media, Inc.
Suite 1020
1401 H Street, N.W.
Washington, D.C. 20005
202-326-3818

October 13, 1998